In the Supreme Court of the United States

October Term, 1977

No. 77-716

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL., APPELLANTS

v.

NATIONAL COLLEGE OF BUSINESS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES IN SUPPORT OF APPELLEE'S MOTION TO AFFIRM

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Consent for Filing

The American Association of Presidents of Independent Colleges and Universities (Association) is a non-profit organization composed of over 100 presidents of independent institutions of higher learning located throughout the country. The Association's major purposes are to promote and improve the interests of independent American colleges and universities. The schools presided over by several of these member presidents, including the appellee, National College of Business, are directly affected by the rules at issue in this case. The

Solicitor General and counsel for the National College of Business have given written consent to the Association to file a brief as amicus curiae. Copies of these written consents have been filed with the Clerk.

QUESTIONS PRESENTED

1. Whether on the facts of the record in this case there is a linkage sufficient to satisfy the rational basis standard between the 85-15 and two-year requirements, and the statutory objective that veterans' educational benefit funds be spent on educational programs of acceptable quality.

2. Assuming that the first question can be answered in the affirmative, whether the irrebuttable presumptions that the 85-15 and the two-year rules represent fall outside the exception stated by *Weinberger v. Salfi* to the doctrine that irrebuttable presumptions are disfavored.

SUMMARY OF ARGUMENT

The judgment of the District Court should be affirmed. This can and should be accomplished without reaching the question whether a standard other than rational basis governs the case.

The Government's evidence on the record in this case fails to satisfy the rational basis standard for two reasons. First, there is no evidence on the record to support any positive relationship between the statutory objective and the discriminatory means selected to achieve it. The uncontradicted evidence is that the effect of both of these rules is to detract from, rather than to enhance, the quality of educational programs. Second, even if there were some evidence to support the Government's position on this crucial issue, the rational basis test would still not be satisfied because of the peculiar facts and circumstances of this case, particularly the availability of alternatives that would effectively achieve the statutory objective without infringing on important constitutional rights.

If the Court should decide that the rational basis test applies and that it is satisfied, the Court would then have to decide whether the irrebuttable presumptions which the 85-15 and two-year rules constitute fall within the exception category stated by *Weinberger v. Salfi*, 422 U.S. 749 (1975). It is our position that they do not, because of significant differences between veterans' education benefits and social security benefits.

ARGUMENT

I.

The 85-15 and Two-Year Rules Fail to Satisfy the Rational Basis Test

Rational basis, compelling state interest, or any standard in between, represents an attempt to express the extent to which the Government may trench upon the interests of its citizens without the protections of the Constitution coming into play. There is of course no quantitatively identifiable point at which citizen interests will be protected. The conflicting interests on both sides—those of the Government and those of the individual—must be taken into account. Rational basis simply expresses the generality that in some kinds of cases the balance scales will be weighted in favor of the Government. Conversely, compelling state interest, in those cases where it applies, weights the scales in favor of the individual.

Obviously, rational basis and compelling state interest are not the only possible tests for expressing the constitutionally permissible limits on governmental intrusion into constitutionally protected areas. There are conceptual intermediates, and the opinions of this Court have implied their recognition. *Trimble v. Gordon*, 430 U.S. 762 (1977); *Craig v. Boren*, 429 U.S. 190 (1976). It is equally obvious that regardless of whether there are intermediates, the rational basis and compelling state interest tests as articulated are sufficiently flexible to permit significant case-to-case variation in the constitutionally permissible extent to

which, under either standard, the Government may treat its citizens unequally.

The constitutional problem in this case concerns the weakness of the linkage (or indeed the very existence of any linkage) between a concededly proper governmental end and the means selected to achieve that end. No one will question the propriety of the governmental objective that—in the words of the District Court—"veterans enroll in quality courses if federal dollars are going to help support those courses." App.A, J.S., p. 22a.

The specific due process/equal protection question in this case, then, is whether there is a constitutionally acceptable linkage between the quality of a course and either the quantity of veterans who attend it, or the length of time it has been offered at the particular location.

The Government's solution is a simple one, involving a neat logical format: (1) this is a welfare benefits case to which the rational basis test applies; (2) the District Court determined that there is a rational basis; and (3) the relevant constitutional test is therefore satisfied.

This is probably not the most appropriate case for a definitive pronouncement concerning whether there is an intermediate standard between rational basis and compelling state interest. That issue need not be reached in this case. The Government's position, summarized above, suffers from two fundamental defects.

1. The first defect in the Government's position is its failure to recognize that without contradiction, the record evidence in this case establishes that the 85-15 and two-year rules have a negative, rather than a positive effect on the quality of the veterans educational experience. The testimony of two qualified professional educators that there is no positive relationship is

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1. See Transcript of Hearing (Tr) 178-179, 202, 255-256.

uncontradicted.[1] Moreover, each of the rules, for separate reasons, was shown to have a deteriorating effect on program quality, and that evidence is also uncontradicted.[2]

The Government's witness spoke of two abuses that had arisen, recruiting programs aimed especially at veterans, and the establishment of branches apart from the main campus as a means of attracting veterans.[3] This was the Government's only evidence on this crucial issue of the relationship between the statutory objective and the two rules at issue. It fails to satisfy the rational basis standard. The only "abuses" toward which the Government's evidence was directed were veteran recruiting and the establishment of branch campuses. These are not the "evils" at which this legislation was—or constitutionally could have been—aimed. Indeed, they are not evils at all, unless there is some evidence linking them not only to the 85-15 and two-year rules, but also to the quality of veteran education programs. There is no such evidence. The only evidence on the controlling issue in the case—whether there is a positive relationship between the 85-15 and two-year rules and the quality of veteran education programs—is that these rules are more likely to interdict the quality veterans' education programs than the bogus ones.

Neither is it sufficient to contend that Congress may assume a relationship between the statutory objective and the discriminatory means intended to achieve it. Such an assumption may enable the statute to survive a facial attack, but in this case there

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2. The average veteran student at the National College of Business is 37½ years old, has 2.2 children and works full time. Tr. 138. Because of the veterans' distinctive circumstances, they do not feel comfortable in a learning setting where they are in competition with younger people who have not been away from school for so long. Tr. 39-40, 139. The learning environment is therefore better for veterans when they can go to school with other veterans. Tr. 39-40, 185. With regard to the tie between the two-year rule and the quality of the educational program, the only evidence is that "a new program is probably going to be better than an old program because it has recently been reviewed . . . whereas some of the older programs . . . may be . . . still offered simply because no one has bothered to take a look at them." Tr. 176.

3. Tr. 275-277.

has been a trial, with opportunity to both sides to present evidence on the record that they considered relevant. Before this Court any general assumption favoring Congress must yield to the actual evidence on the record.

The Government asserts that "these statutory provisions simply channel the veterans' educational efforts toward courses that are likely to be more worthwhile. . . ." J.S. p. 9. That assertion is crucial to the Government's case. The problem with it is that it is squarely inconsistent with the record. There is no evidence that the 85-15 rule channels veteran efforts toward worthwhile courses. The only effect of that rule is to channel veterans away from other veterans. Yet the sole evidence is that veterans learn best when they go to school with other veterans.[4] Similarly the two-year rule does not channel veterans toward worthwhile courses. It channels them toward old courses, and the uncontradicted evidence is that to the extent the age of a course is relevant, it is the newer courses that are more likely to be worthwhile, because they have more recently had to stand the test of curricular review.[5]

2. The second deficiency in the Government's position is its narrow view of the extent of the constitutional protection afforded by the rational basis standard. Molding this case to fit the sterile logical forms to which the Government would subject it, depends on the premise that under all circumstances rational basis will permit any hypothetically conceivable relationship between the legislative end and the means selected to achieve it, no matter how tenuous the relationship is in fact, no matter how important the interests infringed upon or the certainty of the infringement, and no matter what alternatives are available. Indeed, the reason that the Government was able to enlist the District Court's opinion in support of its near syllogism is that the District Court also takes a narrow view of the protections

4. Tr. 39-40, 139, 185.
5. Tr. 176.

afforded by the rational basis standard: "almost anything can pass the most minimal level of scrutiny which is allowable within the concept of rational relationship." App. A, J.S., p. 22a.

Rational basis is not a monolith that always upholds Government's infringements on the rights of its citizens. By definition, its anchorage to reasonableness implies that all of the circumstances of the particular case will be taken into account. This means, at a minimum, that consideration must be given to the availability and superiority of alternatives.[6]

In this case there are alternatives. Unlike the 85-15 and two-year rules, these alternatives (1) are effective in separating quality from non-quality programs, and (2) do not trench upon constitutional rights. A pervasive feature of education beyond high school in this country is the maintenance of quality through accreditation. Like any other human undertaking, the accreditation of higher education institutions and programs has imperfections, but it represents our system's best efforts to evaluate an entire program and reach a net conclusion concerning quality. The record in this case shows that the Government itself—including the Veterans Administration—recognizes the accreditation process and relies on its results for some purposes.[7] Thus, if the ultimate end is to spend veterans' educational dollars only on educational programs of acceptable quality, the means for achieving that salutary end are available. There might have to be some adaptation of existing accreditation procedures, but if so, that is a small enough price to avoid the serious intrusions on constitutionally protected interests that otherwise result.

The worst vice of the 85-15 and two-year rules is that they are cruelly over-inclusive. Even assuming—contrary to the only evidence on this record—that these rules provided some indicia

6. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). Cf. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 31 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).
7. Tr. 107, 212, 293-295.

of program deficiencies, serious constitutional questions would remain because of the vast range of high quality programs necessarily caught in their undiscriminating nets. The record amply demonstrates, for example, that the appellee National College of Business offers a sound, high quality educational program. Notwithstanding the quality of its program, and notwithstanding the fact that quality is the statutory objective, veteran students attending the National College of Business, and many other schools like it, are deprived of the statutory benefits. There is no evidence on this record that courses offered by the National College of Business and similar schools do not make a material contribution to the veterans' education, and through them, to the national welfare.[8] The only evidence is that they do. There is no evidence that courses having more than 85% veterans enrolled or that have been offered less than two years are any lesser in quality. The only evidence is squarely contrary.

II.

The 85-15 and Two-Year Rules Are Unconstitutional Irrebuttable Presumptions

If the Court should conclude that the requirements of due process/equal protection were satisfied in this case, the Court would then have to deal with the due process/irrebuttable presumption issue. Both the 85-15 and also the two-year rule are clearly irrebuttable presumptions. As such, they fall in a category that has "long been disfavored"[9] under the due process clause. Both rules presume that any course that has more than 85% veterans enrolled or that has not been offered for two years at that location does not yield sufficiently worthwhile educational benefits to justify the expenditure of veterans' educational benefit funds. There is no opportunity to rebut that presumption in the individual case, even though it is obvious that there are many

8. It has been estimated that money spent for veterans' education purposes yields a return in increased taxes of three to six times the amount invested. Tr. 186.

9. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973).

high quality courses that are new or that have high veteran enrollment. Indeed, the uncontroverted evidence on this record is that high veteran enrollment or newness of course provides no basis for presuming inferiority of the course.

In our view, the applicability of the irrebuttable presumption doctrine would not be foreclosed by this Court's holding in *Weinberger v. Salfi*, 422 U.S. 749 (1975) that "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status. . . ." 422 U.S. at 772. Whether technically "contractual" or not, the prospect of educational benefits is a major inducement used by military recruiters to attract military recruits.[10] These benefits are therefore different from the benefits in *Salfi*, and the rationale for excluding public benefit payments generally from the reach of due process protection against "procedure by presumption"[11] is inapplicable.

This court has never decided whether the *Salfi* exception applies to veterans' educational benefits. It will be called upon to do so in this case if it rejects the appellees' due process/equal protection claims.

The recent amendments to the statute do not diminish its constitutional defects. Limiting the 85-15 rule to those programs that enroll 35% or more veterans may lessen the number of programs affected by the statute's arbitrariness, but the arbitrariness itself is left untouched. The fatal, and erroneous, assumption of an inverse relationship between quantity of veterans and quality of program is still present.

The change in the two-year rule is especially significant. The Administrator is now given the discretion to waive this requirement.[12] On what basis will he waive? If he makes an effort to identify those courses offered less than two years whose

10. Tr. 17.

11. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

12. Even before the amendment he had the discretion to waive the 85-15 rule. 38 U.S.C. (Supp. V) 1673(d), as amended by Pub. L. 94-502, Section 205, 90 Stat. 2387.

educational value makes them not worth spending veterans' dollars on them, he will be making the kind of inquiry that is relevant to the statutory objective and that will satisfy the demands of the Constitution. This is the kind of inquiry that he ought to be making anyway. If he exercises his waiver on some other basis, it will run the risk of being arbitrary, because of the lack of relationship to the statutory objective. But in either case, the quality of the course is unrelated to whether it has been offered for two years.

CONCLUSION

Gauged by either equal protection or irrebuttable presumption standards, this statute is defective. The objective of the statute is to channel veterans' educational benefit dollars into programs of acceptable quality. Yet the statutory means are unrelated to quality. By tying its objective to an irrelevant means, the statute has excluded from its benefits many undeniably worthwhile programs and their enrollees. Whether it has also excluded programs of little value has been left to chance.

The judgment of the lower court should be affirmed, so that the salutary objective of this statute can be pursued through constitutionally permissible means.

Respectfully submitted.

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